No. 983.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA FISH AND LUMBER COMPANY,
Plaintiff in Error,

vs.

EDWARD A. CHASE,
Defendant in Error.

PETITION FOR REHEARING,

FILED ON BEHALF OF DEFENDANT IN ERROR.

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To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This is a case in which the defendant in error recovered a judgment against the plaintiff in error for $1773, for damages for a wrongful discharge under a contract of employment. Your Honors, on the 1st day of March, 1904, filed your opinion reversing the judgment of the Court below, on the ground that the Court erred in instructing the jury that the damages, which the plaintiff was entitled

to recover, was the amount due under the contract from the date of the employment to the time of the rendition of the judgment, less the amount actually paid, without instructing the jury that it was the plaintiff's duty (if he was improperly discharged) to use prompt and reasonable diligence to procure other employment of a similar character, and thus reduce the damages. Your Honors said: "The plaintiff's duty if he was improperly dis- " charged was to use prompt and reasonable diligence to " procure other employment of a similar character, and " thus reduce the damages; and if he did not conform to " that duty, the damages should be mitigated to the ex- " tent of the compensation which he might have received " by proper effort in seeking employment."

In so deciding, we very respectfully submit, your Honors have overlooked the all-important and vital rule, that *the mitigation of the damages by securing other employment is matter of defense; that the burden of proving it rests upon the defendant; that the opportunity for such employment is not presumed; that the plaintiff was under no duty of proving that it did not exist; that as the defendant offered no such proof, there was no question upon that subject to go to the jury; that it would have been error for the Court to have submitted it to the jury, and that the plaintiff was entitled to recover the whole amount of the stipulated compensation as the damages attributable to the defendant's breach of contract.*

If we can, by this petition, convince your Honors that you have overlooked this rule, *which was not called to your attention,* then we most earnestly and respectfully ask that you grant us a rehearing.

The undisputed facts are that the plaintiff entered the employ of the defendant on March 1st, 1902, and continued therein until discharged, on the 24th day of June, 1902. He was employed under a written contract for one year, at the rate of $200 per month. He testified that he was discharged without cause, although he had performed his duties to the best of his ability; that, after his discharge, he tried to get employment of the same or a similar character as that from which he was discharged, but was not successful. The record then recites (*Tr.*, p. 52): "After " some evidence had been introduced on behalf of the de- " fendant, and the plaintiff having offered some in re- " buttal, and the cause having been submitted to the jury, " the Court then gave the following instructions to the " jury". *The defendant offered no evidence whatever to prove that the plaintiff could have secured other employment.*

In the absence of an affirmative showing by the defendant that the plaintiff could have secured other employment, had he made reasonable efforts in that behalf, we most respectfully submit that the amount of wages agreed to be paid was properly taken as the measure of damages, and that the Court did not err in excluding from its instructions to the jury the question whether or not the plaintiff might have lessened the amount of the damages by securing other employment similar to that from which he was discharged.

In justice to your Honors, in justice to the Judge of the Court below whose interpretation of the law, as embodied in his charge to the jury, your Honors are reversing,

and, finally, in justice to this defendant in error, we petition your Honors to briefly reconsider the supposed omission in the instructions of the Court, in the light of the very cases upon which you have based your opinion.

In *Saxonia Mining & Reduction Co. v. Cook,* 4 Pac. 1111, 1113, the first case cited by your Honors, the Court said:

> "The amount of the agreed wages may be taken as the measure of damages *prima facie,* or in the absence of any other showing. * * * But while the defendant in such case is entitled to mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, *the burden of establishing such mitigating fact is upon the defendant.*"

In *Park Bros. Co. v. Bushnell,* 60 Fed. 583, 591, 592, the Court of Appeals says that the trial court correctly charged the jury in conformity with *Howard v. Daly,* 61 N. Y. 362, and *Costigan v. Railroad Co.,* 2 Denio 609; those being the other two cases to which your Honors refer.

In *Howard v. Daly,* 61 N. Y. 362, the Court said:

> "*Prima facie,* the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or, at least, that such employment might have been found. *I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found* (2 Greenl. on Evid., § 261, a; *Costigan v. M. & H. R. R. Co.,* 2 Den. 609.) *No such evidence having been offered by the defendant, the plaintiff should recover the whole amount of her stipulated compensation as the damages attributable to the defendant's breach of con-*

> *tract.* This, as has been seen, is the true measure of damages. (*Classman v. Lacoste,* 28 E. L. & Eq. 140; *Goodman v. Pocock,* 15 Ad. & El. 576; *Smith v. Thompson,* 8 C. B. 444; *Smith on Master & Servant,* 98)."

In *Costigan v. The Mohawk & Hudson R. R. Co.,* 2 Denio 609, the Court decided that, in a suit for a stipulated compensation, the defendant may show in diminution of damages that, after the plaintiff had been dismissed, he had engaged in other business, or that employment, of the same general nature, as that from which he had been dismissed, had been offered to him and been refused by him; *the opportunity to be so employed, however, will not be presumed, but must be affirmatively shown by the defendant on whom rests the burden of proof* (pp. 616, 617):

> "I think we cannot, as between these parties, presume that the plaintiff might have been so employed and that he refused; and therefore the report, in my judgment, should be set aside. If the defendants can prove that such employment was offered, it may reduce the amount otherwise recoverable; but if such proof shall not be given, the report, I think, should be for the salary at fifteen hundred dollars a year, and rent at one hundred and fifty dollars, and for a full year, deducting the amount which may have been paid towards the same."

After a most diligent and careful search of the authorities bearing upon this question, we have not found a single one which announces a doctrine, other than that for which we here contend. We respectfully ask your Honors to consider a few of the cases.

In *Schroeder v. California Yukon Trading Co.*, 95 Fed. 296, the District Court for the Northern District of California (De Haven, J.) said:

> "One who has been wrongfully dismissed from service is entitled *prima facie* to recover as damages therefor an amount equal to what he would have earned for the entire term of his employment, if he had been permitted to perform his contract; but the defendant may show for the purpose of reducing this sum, that the plaintiff earned and received wages in some other employment during the period of time covered by the contract, or that with reasonable diligence on his part he might have earned something by accepting from others work of the same general character as that which he was employed by the defendant to perform."

The Supreme Court of California, in *Rosenberger v. Pacific Coast Ry. Co.*, 111 Cal. 313, 318, said:

> "While it is the duty of an employee who has been wrongfully discharged to seek other employment, and thus diminish the damages sustained by him, he is not required, as a condition of recovery, to show that he has made such endeavor and failed. The burden is on the defendant to show that he could by diligence have obtained employment elsewhere. Whatever compensation may have been received in such employment is also to be shown by the defendant in mitigation of damages; otherwise the damages will be measured by the salary or wages agreed to be paid. (*Sutherland on Damages*, sec. 693; *Costigan v. Mohawk etc. R. R. Co.*, 2 Denio 609; 43 Am. Dec. 758; *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285; *Utter v. Chapman*, 43 Cal. 279.)"

In *Barker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630, 638, the Supreme Court of Wisconsin said:

> "*The instructions asked by the defendant, which*

sought to authorize the jury to reduce the plaintiff's damages if they should find in his favor, by the amount which he might have earned elsewhere, after his wrongful discharge, were properly refused. The rule in such cases is, that although the damages may be so reduced, yet the burden is on the defendant to show affirmatively that the plaintiff might have had employment and compensation elsewhere. *Here the defendant offered no such proof, and there was therefore no question upon that subject to submit to the jury.*''

In *Farrell v. School District etc.,* 56 N. W. 1053-4 (98 Mich. 43), it is said by the Supreme Court of Michigan:

''A plaintiff may rest his case upon proof of a contract of service, its breach, and damages, which are determined by the contract price of the services. The defense that he was engaged in other profitable employment, or might have had other similar employment, is an affirmative one and the burden of proof is upon the defendant. If an employer sees fit to discharge his employee without legal excuse, it is equally within his power to seek, and, if he find, to offer, other similar employment to such employee or to furnish evidence to the jury that such employment might, with reasonable effort, have been obtained. When he has been guilty of the wrong the law casts the burden upon him to show that the employee has not, or need not have, suffered damage.''

So in *Odoneal v. Henry,* 12 So. 154, the Supreme Court of Mississippi says:

''The appellants have no reason to complain of the first instruction given for appellee. Primarily, it was not incumbent upon the appellee to satisfy the jury that he had made diligent efforts to obtain employment, and had failed. If, after his discharge, he had other employment, or if he could have had, and failed or neglected to secure it, the appellant should

have made the proper proofs. Such proof is defensive in its character, and goes to reduce damages assessable against the discharging employer. The burden of proof on this point was on the appellants; and if there was no evidence, as counsel for appellants assert, showing when, if ever, appellee secured other employment, the appellee must not be held to have failed in making out his case. He was only to be required to meet any state of case made by appellant's evidence, which showed that he had been in other employment during the period of contract of service or that he might have been."

The Supreme Court of Arkansas, in *Van Winkle v. Satterfield*, 58 Ark. 617, 623 (25 S. W. 1113; 23 L. R. A. 853) says:

"The burden of proof is on the employer to show that the servant might have obtained similar employment, for the failure of the servant to obtain other employment does not affect the right of action but only goes in reduction of damages and if nothing else is shown 'the servant is entitled to recover the contract price, upon proving the employer's violation of the contract, and his own willingness to perform'. The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss. *Howard v. Daly,* 61 N. Y. 362; 19 Am. Rep. 285; *Gillis v. Space,* 63 Barb. 177; *Costigan v. Mohawk & H. R. R. Co.,* 2 Denio 659; 43 Am. Dec. 758; *Sutherland v. Wyer,* 67 Me. 64; *2 Sutherland Damages,* §693; *Wood, Mast. & S.,* p. 245."

To the same effect are:

Leatherberry v. Odell, 7 Fed. 641;

Ansley v. Jordan, 61 Ga. 482;

Holloway v. Talbot, 70 Ala. 389, 392;

Strauss v. Meertief, 64 Ala. 299, 309; 38 Am. Rep. 8;
Horn v. Western Land Assn., 22 Minn. 233, 237;
Emery v. Steckel, 17 Atl. 601, 602;
Hinchcliffe v. Koontz, 23 N. E. 271, 272.

In your opinion your Honors say: "The jury might "have been satisfied from the plaintiff's own testimony, "from his manner of testifying, for instance, that he "did not make any reasonable or *bona fide* effort to ob- "tain other employment, and yet by the instructions of "the Court they were precluded from giving effect to "such a conclusion." But, your Honors, *the plaintiff was not, for the purposes of his case, required to prove that he made any reasonable, or bona fide, or any, effort to obtain other employment; that he could have done so was completely and absolutely a matter of defense for the defendant.* His testimony upon the subject, in the absence of any evidence thereon by the defendant, was entirely irrelevant and immaterial and, therefore, of no consequence whether submitted to, or withdrawn from, consideration of the jury.

As said by the Supreme Court of Indiana in the case of *Hamilton v. Love,* 43 N. E. 873, at page 874:

> "Nor is it true that the discharged servant must allege that since his discharge he has earned nothing from sources other than that of his employment under the broken contract. It is true that any sum earned by him, or which, by reasonable diligence, might have been earned by him, after his discharge, is to be considered against the value of his wages under the contract; but this conclusion does not require that he shall, in the first instance, negative the fact of his having earned nothing, and having been unable to

> get employment. The most that can be required of him in the first instance, is to plead and establish a *prima facie* case; and then, in response to this *prima facie* case, the defendant must establish the fact that the plaintiff has, or could have, earned wages after the discharge."

We earnestly say, therefore, that the amount of the wages agreed to be paid was *prima facie* the measure of the damages which the plaintiff suffered; that the complaint, which was drawn after a careful examination of the authorities, is based upon a proper theory; that it is not for constructive services, but for those damages which *prima facie* flow from the facts alleged; that it was incumbent upon the defendant, if it had so desired and could have done so, to have proved in mitigation of these damages that the plaintiff could, with reasonable diligence, have secured other employment; that in the absence of any such proof it would have been error for the trial court to have instructed the jury otherwise than it did.

Without calling to the attention of your Honors, further than in passing, that additional and controlling reasons exist for granting a rehearing, because *no exception to the instructions was taken before the jury retired,* contrary to the rule declared by this Court in *Yates v. U. S.,* 90 Fed. 57; and in *West. Union Tel. Co. v. Baker,* 85 Fed. 690 (see also *Sutherland v. Round et al.,* 57 Fed. 467; *Emanuel v. Gates,* 53 Fed. 773, 775, 776); because *the exception to the instructions did not suggest, or point out, the defect complained of, so as to bring it distinctly to the Court's attention and afford an opportunity to remedy an*

omission, if any existed, but was taken to the instructions as a whole, contrary to the established practice (see *Cass County v. Gibson,* 107 Fed. 363, 367; *Eastern Oregon Land Co. v. Cole,* 92 Fed. 949; *Price v. Pankhurst,* 53 Fed. 312; *New England etc. Co. v. Catholicon Co.,* 79 Fed. 294, 296; *Texas & P. Ry. Co. v. Volk,* 151 U. S. 73, 78), we very respectfully petition your Honors, for the reasons herein stated, to grant a rehearing in this case.

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I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

ALFRED SUTRO,
Of Counsel for Defendant in Error.

Dated: San Francisco, April 15th, 1904.